Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WHITNEY NORTH SEYMOUR, JR.*
PETER JAMES CLINES
LANDY & SEYMOUR
Attorneys for Petitioners
363 Seventh Avenue, Room 1300
New York, New York 10001
(212) 629-0590

* *Counsel of Record*

QUESTIONS PRESENTED

1. Whether Congress, by requiring local zoning boards to approve the construction of cellular phone towers[1] without regard to the health impact of high frequency radiation, has commandeered legislative processes of the states to administer a federal program, in violation of the Tenth Amendment as interpreted by this Court in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997).

2. Where Congress has failed to fund continuing Federal research into potential adverse health effects of radiation emission from cellular phone towers, does Congress have the power to prohibit State and local governments from protecting the health of their citizens by taking into account available research and official standards from other countries in regulating the placement of cellular phone towers?

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[1] For convenience, the phrase "cellular phone towers" is used as shorthand in this petition to cover all personal wireless services facilities (PWSF).

PARTIES TO PROCEEDING

The full list of petitioners in this Court is as follows: Citizens for the Appropriate Placement of Telecommunications Facilities; Christopher Beaver of Noe Valley Families Against the Antennas; Maggie Fox; Major Belkin, M. Sue Storm of Healthy Home Alliance; Joseph Bogacz; Candice Brown and Gary Brown of Families for Appropriate Cellular Tower Siting; Jerry Davis; Mary-Croughan Minihane; Libby Kelley; Silvia M. Siegel; Annegret C. Topel; David Gell and Andrew J. Hillman of Ulysses Citizens for Responsible Technology; Holly A. Fournier; Richard Gianttiasio of Northboro Residents for Responsible Tower Siting; Dale A. Newton, Jane and L. Newton, Bernard Greenberg, Lorinda A. Knowlton, and Roger Knowlton of Thistle Hill Neighborhood Alliance; Frank Goodrich; Marija Hughes, Mark Hutchins; Julie E. Jordan; Jeannine Karlsson; Dorothy Miller; Ed Steinman and Patricia Vaughey; Cathy Bergman-Venezia of The EMR Alliance; The EMR Alliance. There are no parent companies or wholly owned subsidiaries to be listed.

The parties to the proceeding in the Court of Appeals were Cellular Phone Taskforce, Ad-Hoc Association of Parties Concerned about the Federal Communications Commission Radio Frequency Health and Safety Rules, David Fichtenberg, Citizens for the Appropriate Placement of Telecommunications Facilities, John Bardis, Erica Zweig, of Telecommunications Master Plan Coalition of San Francisco, Christopher Beaver, of Noe Valley Families Against the Antennas, Major Belkin, Donna Casey, Maggie Fox, Eileen Lahey, Mark R. Shirley, M. Sue Storm, of Healthy Home Alliance, Joseph Bogacz, Candice Brown, Gary Brown of Families for Appropriate Cellular Tower Siting, Susan Clarke, of Environmental Health Advocacy League, Mary-Croughan Minihane, Libby Kelley, Silvia M. Siegel, Annegret C. Topel, of Citizens of Marin for Sensible Communications Planning, Jerry Davis,

Jean Foley, of Ulysses Citizens for Responsible Technology, Holly A. Fournier, Selectboard Member of Charlotte, VT and co-chair of Citizens for the Appropriate Placement of Telecommunications Facilities, Julianna Free, of Lifeline Resources, Inc., Anne Galloway, of Hardwick Action Committee, David Gell, Richard Gianattiasio, of Northboro Residents for Responsible Tower Siting, Dale A. Newton, Jane and L. Newton, Bernard Greenberg, Lorinda A. Knowlton, Roger Knowlton, of Thistle Hill Neighborhood Alliance, Cathy Bergman-Venezia, Frank Goodrich, Andrew J. Hillman, Marija Hughes, Mark Hutchins, Ralph E. Munston, of EMR Alliance, The EMR Alliance, Julie E. Jordan, of Coalition of Concerned Citizens for Responsible Technologies, Jeannine Karlsson, Commissioner of Town of Bedford Conservation Board, Patricia Kelley, Susan Lawrence, Emery Lazar, Dawn Mason, State of Washington Representative, Dorothy Miller, Advisory Neighborhood Commissioner, Edward Steinman, Peter de Pippo, Michael Worsham, The Communications Workers of America, AFL-CIO, CLC, CWA Local 7810, Rainer Waldman Atkins, Alan Golden, Virginia J. Moore-Ward and Faye Mueller-Hebert of the Rainier Valley Association for Safe Wireless Technology, Patricia Vaughey, Bill Jenkins of Olympia Washington Local 7810 of the Washington State Communication Workers of America (CWA) and the Council of Washington State CWA Locals, Petitioners. Cellular Telecommunications Industry Association, National Association of Broadcasters, Association for Maximum Service Television, Inc., Electromagnetic Energy Association and AT&T Wireless Services, Inc., Intervenors. Federal Communications Commission and United States of America, Respondents.

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OPINIONS BELOW

The original opinion of the Court of Appeals is reported as *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000) and reproduced herein in the Appendix ("A") at A-1. The opinion of the United States Court of Appeals for the Second Circuit denying the petition for rehearing by the Cellular Phone Taskforce is reproduced at A-23. The opinion of the Second Circuit denying the petition for rehearing by Communications Workers of America is electronically reported at 2000 WL 862305 and reproduced herein at A-26. The Orders of the FCC are reported at 11 F.C.C. Rcd. 15123 (1996) and 12 F.C.C. Rcd. 13494 (1997) and have been lodged with the Clerk of this Court, due to their voluminous nature.

JURISDICTION

On February 18, 2000, the Court of Appeals affirmed the Orders of the FCC, thereby upholding the validity of the statutory and regulatory provisions in question. (A-22) On June 15, 2000, the Court of Appeals denied the timely petition for rehearing by the Communications Workers of America. Pursuant to Supreme Court Rule 13, this petition is filed within 90 days of that decision. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 2342(1).

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved in this case are as follows:

> Article I, Clause 8 of the United States Constitution, which provides that "Congress shall have power to regulate commerce . . . among the several states. . . ."

Additional constitutional and statutory authorities are reproduced in the Appendix at A-28 through A-39.

STATEMENT OF THE CASE

This case challenges the Constitutionality of the Telecommunications Act of 1996 and FCC implementing regulations. Petitioners seek review of a Second Circuit decision upholding the constitutionality of the Act, to determine whether it conflicts with a line of Tenth Amendment/Commerce Clause decisions rendered by this Court in *New York v. United States*, 505 U.S. 144 (1992), *Printz v. United States*, 521 U.S. 898 (1997), *Alden v. Maine*, 527 U.S. 706 (1999) and *United States v. Morrison*, 529 U.S. __, 120 S. Ct. 1740 (2000). Review is also sought to resolve the direct conflict between the Second Circuit decision and a recent concurring opinion by Fourth Circuit Judge Niemeyer in *Petersburg Cellular Partnership v. Board of Supervisors*, 205 F.3d 688 (4th Cir. 2000).

In *New York*, this Court determined that under the Tenth Amendment, Congress could not compel states to pass legislation addressing a critical problem of public policy, *i.e.*, the shortage of disposal sites for hazardous radioactive waste. (505 U.S. at 175-177) This holding was expressly reconfirmed in *Printz*. 521 U.S. at 933. This case is the mirror-image of *New York*, inasmuch as it presents the issue of whether Congress may compel state or local governments to pass zoning legislation which *fails* to adequately address a crucial policy issue: *i.e.*, the health risks associated with radio frequency radiation from cellular phone tower sites. Petitioners contend that such an Act of Congress violates the holdings of both *Printz* and *New York*, as well as that of the very recent decision in *Alden*, which prohibits the Federal Government from infringing upon the "residuary and inviolable sovereignty" retained by the states (527 U.S. at 715, *quoting The Federalist No. 39*, at 245), and *Morrison*, which reconfirms that states possess a plenary police power which cannot be overridden by Congress. (120 S.Ct. at 1754) In *Petersburg*, *supra*, Circuit Judge Niemeyer concluded in his concurring opinion that provisions of the Act imposing

conditions on state and local regulation of the siting of cellular phone facilities were inconsistent with the principles of Federalism enunciated by this Court in these decisions.

Proceedings Below

Petitioners are "Citizens for the Appropriate Placement of Telecommunications Facilities" of Charlotte, Vermont, together with numerous other community citizens organizations and individual citizens from other parts of the country. Petitioners participated in administrative and judicial challenges to FCC regulations concerning the environmental and health effects of radio frequency emissions from cellular telephone facilities. The challengers appealed to the Second Circuit Court of Appeals from two final opinions and orders of the FCC. These orders set standards for human exposure to radio frequency radiation emitted from transmitters and facilities regulated by the FCC, including "personal wireless service facilities," commonly known as cellular phone towers. They also, *inter alia*, announced rules implementing section 704 (c)(7)(B)(iv) of the Telecommunications Act of 1996, which precluded state or local governments from regulating the siting of wireless service facilities on the basis of environmental effects, including health effects, provided the facilities comply with the aforementioned FCC emissions standards. *See Guidelines for Evaluating the Scientific Effects of Radiofrequency Radiation*, 11 F.C.C. Rcd. 15123 (1996) ("First Report and Order"); *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 F.C.C. Rcd. 13494 (1997) ("Second Memorandum Opinion and Order").[2] Petitioners challenged the substantive guidelines on a number of statutory grounds and asserted that the regulatory prohibition, as well as the statutory provision on which it is

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[2] Due to their voluminous nature, copies of these agency opinions have been lodged with the Clerk's office.

based (*codified* at 47 U.S.C. Sec. 332(c)(7)(B)(iv)), is unconstitutional facially and as applied.

The Second Circuit rejected all of petitioners' claims and upheld both of the FCC Orders. With respect to the Constitutional claims, the panel found that the prohibition on state regulation of the siting of wireless facilities was within the scope of Congress' legislative power under the Commerce clause and that the "statute does not commandeer local authorities to administer a federal program in violation of the federalism principles embodied in the Tenth Amendment and set forth" in *New York* and *Printz*. (205 F.3d at 96.) (A-21) By decisions dated June 6, 2000 and June 15, 2000, respectively, the Second Circuit denied rehearing of its decision. (A-23) (A-26)

The Telecommunications Act of 1996:
The Clash Between Federal Policy and State Regulation

A primary purpose of the Telecommunications Act of 1996 was to "encourage the rapid deployment of new telecommunications technologies" such as wireless or cellular telephone service. (Pub. L. No. 104-104.) The Act instituted a major overhaul of wireless telecommunications regulation, in order to encourage the construction of a broad national network of communications towers for use by providers of cellular telephone and other wireless services. *See Petersburg*, 205 F.3d at 697. As Congress recognized, there were obvious tensions between the federal policy to encourage proliferation of cellular telephone facilities and state and local governments' desire to maintain control over local land use regulation. A clash between the two was inevitable. Indeed, as the legislative history reflects, a primary purpose of the Act was to override local zoning regulators, who were believed to standing in the way of industry plans for expansion. (*See id. quoting* H.R. Rep. No. 104-204 at 94 (1995) noting the legislators' view that "a conflicting patchwork" of state and local zoning requirements

was "inhibiting deployment" of wireless services.) Local concerns over the environmental effects of radio frequency emissions were a particular bone of contention, and local zoning decisions based on such concerns were singled out for preemption, allegedly because they were "at times not supported by scientific and medical evidence." (*See id quoting* H.R. Rep. No. 104-204 at 95.)

State and Local Input In Siting Decisions: The Compromise Enacted Into Law

Despite Congress's wish to prevent local governments from frustrating the federal policy of expansion, it also recognized that "there are legitimate State and local concerns involved in regulating the siting" of cellular telephone towers (*see* H.R. No 104-204 at 94-95), and that these authorities could not be completely excluded from the siting process. Congress therefore considered ways to provide for limited state and local input, while denying localities authority to base siting decisions on their independent assessment of health effects of radio frequency radiation in their communities. Under the House version of the Act, the FCC was given "authority . . . to regulate directly the siting of towers" (*Petersburg* at 205 F.3d at 698), while input from State and local governments was to come through their participation in a "negotiated rulemaking committee," along with industry representatives and public safety agencies. H.R. Conf. Rep. No. 104-458 at 207 (1996). The committee's purpose was to recommend a national siting policy for the FCC to implement which ensured that "the siting of facilities cannot be denied on the basis of Radio Frequency (RF) emission levels which are in compliance with Commission (RF) emission levels." (H.R. 104-204 at 94.)

In contrast to the House bill, the Senate version of the Act permitted local governing bodies to continue to regulate the siting of cellular towers. *See Petersburg*, 205 F.3d at 698.

To resolve the conflict between the House and Senate versions of the bill, the Conference Committee created a new section 704 which was eventually enacted into law. This section preserved state and local authority over zoning and land use, *provided* that these governing bodies regulate in accordance with federally imposed standards enumerated in that section. (*See infra.*) The statute thereby delegates *responsibility* for siting decisions to local government, while retaining significant federal control over the *outcome* of such local regulation. In considering the constitutionality of such a siting arrangement, it is important to bear in mind the observation of this Court in *New York*, in connection with the choice of radioactive waste sites:

> If a federal official is faced with the alternative of choosing a location, or directing the states to do it, the official may well prefer the latter as a means of shifting responsibility for the ultimate decision.

(505 U.S. at 183)

Section 704

Specifically, Section 704 imposes substantive, procedural and evidentiary standards on state and local siting regulation, which in practical terms can effectively dictate the outcome of local zoning board deliberations. The procedural/evidentiary standards include requirements that zoning decisions regarding the placement, construction or modification of towers be issued "in writing," "in a reasonable period of time" and be "supported by substantial evidence contained in a written record." (47 U.S.C. Sec. 332 (c)(7)(B)(ii) and (iii).)

Substantively, the section prohibits state and local regulators from "unreasonably discriminating among providers"; mandates that local regulations "not prohibit or have the effect of prohibiting the provision of personal wireless services" (47 U.S.C. Sec. 332(c)(7)(B)(i)) and, most significantly for this petition, provides that:

> No state or local government or instrumentality thereof may regulate the placement, construction or modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such facilities.

47 U.S.C. Sec. 332 (c)(7)(B)(iv).

The section also provides an enforcement mechanism, which makes the decisions of local authorities reviewable in state or federal Court "on an expedited basis." (47 U.S.C. Sec. 332(c)(7)(B)(v).)

The FCC Standards

The FCC adopted radio frequency emission standards in 1996 based on "thermal effects" from radiation (that is, the heating of human tissue — as in microwave ovens). The standards do not require any minimum distance between transmitters and human habitations. Although these standards are revised every ten years, to date no emission standards have been established by the FCC based on non-thermal "biological effects" from emissions at below-heating levels (that is, alterations of human cells, various cancers and other diseases).[3]

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[3] As applied, the FCC standards do not take into account numerous research reports finding non-thermal effects. *See* B. Blake Levitt, *Electromagnetic Fields: A Consumer's Guide to the Issues and How to Protect Ourselves*. (Harcourt Brace, 1995).

Recent research in Europe, Australia and elsewhere has shown that cell phone frequencies may cause biological harm. In England, the U.K. Independent Expert Group on Mobile Phones, commissioned by the British government, issued a report in May, 2000, recommending that children under age 16 be discouraged from using cell phones. The report further recommends avoiding the siting of cell phone antenna installations near residences, schools, and hospitals. (One can examine the report at: http://www.iegmp.org.uk) The British minister of education has already sent notices to all British schools about the potential health risks for children from mobile phones.

Practical Consequences of Supreme Court Reversal of Opinion Below

In the event the Court should decide to set aside the preemption provisions of the Telecommunications Act of 1996 and the obsolescent FCC RF emissions regulations, the result will not be an anarchy of obstinate small town resistance to communications progress in the nation. Every local community has its share of residents and institutions who *want* access to reliable wireless communications technology, including:

Fire departments
Local and state police
Emergency ambulance services
Small businesses
Parents of teenagers
Repair services, etc.

These citizens, taxpayers, and public servants already do, and will continue to, urge elected zoning boards to approve construction of telecommunications towers.

The major change will be that local tower siting decisions will be made by *local* elected officials familiar with local

conditions who will be sensitive to the placement of towers close to schools, playgrounds, recreation areas, nursing homes, hospitals, residential areas and the like, and will exercise judgment based on these local conditions in light of current research into potential health effects of RF emissions. Concerned local citizens and public health officers are now able to keep elected local government officials informed about research developments *around the world* thanks to universal access to the Internet.[4]

The objective of this case is not to hobble technological progress, but to empower local officials to make intelligent decisions based on reliable information and direct knowledge of the communities they serve.

There is a wealth of information available about how other nations are handling human health concerns. The following schedule shows present maximum emission standards set by other countries around the world — *all* of them lower than the 1996 FCC permitted levels. These standards are sugges-

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[4] Some of the leading websites are:

www.bioelectromagnetics.org
(Research organization of scientists)

www.iegmp.org.uk/IEGMPtxt.htm
(The Stewart report from England)

www.nrpb.org.uk.NIR-is.htm
(National Radiological Protection Board in England)

www.rsc.ca
(Royal Society of Canada)

www.microwavenews.com
(Newsletter edited by former NRDC staffer)

www.land-sbg.gv.at/
celltower/english/salzburg_resoluton_e.pdf
(Salzburg Resolution)

tive of what might be applied by individual local communities to tower siting decisions.

	Measurement in Public Exposure Limits: Microwatts Per Centimeter Squared[5]
United States	200.0
Italy	10.0
Poland	10.0
China	6.6
Switzerland	4.2
Russia	2.4
Moscow	2.0
Austria	0.1

The real answer, of course, is for Congress to appropriate funds for a comprehensive and continuing EPA-supervised study of non-thermal biological effects at different emission levels — that is why the outcome of this case is so important.

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[5] The FCC limits vary depending on frequency. VHS limits are shown in the table. At cellular and personal communication services telephone frequencies, the FCC limits begin at about 500 microwatts and run as high as 1,000. *See FCC OET Bulletin 65*, (ed. 97-01) at pp. 67-68. Data for the other countries comes from: *Microwave News*, January/February 2000 "Switzerland Adopts Strict Limits for Cell Towers and Power Lines." pp. 1-6; *Microwave News*, January/February 2000, "Italian Wireless Radiation Limits Enter Second Year,"p.7; *Microwave News*, July/August 2000, "Efforts to Harmonize RF/MW Exposure Standards in Disarray," pp. 1-8; *Microwave News*, September/October 1999, "U.K. Parliamentary Panel Seeks Stricter RF Limits, More Research," pp. 1-10; *Microwave News*, September/October 1999 "Chinese RF/MW Exposure Standard Is the Strictest," pp. 9-10.

Currently there is no U.S. Government-funded research program into the non-thermal biological effects of RF emissions. EPA, which formerly conducted such research, lost all of its research funding in 1996, and has done nothing since. So long as telecommunications companies only have to comply with "thermal effects" standards and can otherwise put up towers pretty much wherever they want, the industry will obviously do all it can to *prevent* more research into biological effects. Right now, the federal government's approach is: let's permit the cell phone companies to put up the towers, and we'll worry about human health problems later.

REASONS FOR GRANTING CERTIORARI

Much as *New York v. United States*, this case "implicate[s] one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law." 505 U.S. at 149. The public policy problem here concerns the health effects of radio frequency emissions from cellular phone facilities. The constitutional question concerns the proper relationship between "the Federal government and the states" *id.* — or, more precisely, state-created local zoning boards. Specifically, the issue is who will be accountable to the electorate for the Federal radio frequency emissions standards: The Federal government itself, which is responsible for setting the standards, or the local zoning boards, which, as demonstrated below, have had the standards thrust upon them. Petitioners submit that while Congress has substantial power to preempt State legislation under the commerce clause, the Tenth Amendment precludes Congress from treating state and local legislative bodies as puppets on a Federal string.

Both the public policy question and the constitutional question are of overriding national importance necessitating review by this Court. Indeed, the gravity of the policy question underscores the great significance of the constitutional question. Since the mid-1990s, there has been a veritable

explosion in the number of telecommunication facilities for wireless phone systems, which customarily consist of a tower, antennas and an equipment box with radios. *See* Foster, Heverty and Pugh, "An Analysis of Facility Siting Issues Under Section 704 of the Telecommunications Act of 1996," 30 *The Urban Lawyer*, 729 (1998).[6]

As a result of such cell tower proliferation, federal standards which govern tower emissions have a critical impact on virtually every community across the country, and the effects of those regulations, for good or ill, reach as far as the radio-emissions themselves that penetrate the very homes of millions of Americans. As noted above, under the Telecommunications Act of 1996, these federal standards are *exclusive* and preempt local health regulation. As the authors of a recent article put it:

> In one fell swoop, Congress removed from control of the local governments one of the biggest issues confronting them in the tower siting arena: local opposition based on fear of cancer or other ill effects from the radio emissions of wireless facilities.

Foster, *et al.*, 30 *Urban Lawyer* at 740, *citing Genessee Tel. Co. v. Szmigel*, 174 Misc.2d 567, 570, n. 3 (Sup. Ct. Monroe Cty, 1997).

It is imperative that such a sweeping exercise of federal power with such far reaching consequences in such a crucial area of public health and safety (1) be made in accordance with constitutional principles, and (2) be subject to the effective scrutiny of the people through the electoral process.

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[6] As one commentor has noted, "the wireless communication industry in America has consistently grown at a rate that has outpaced the wildest predictions of economists and industry leaders." Note, "Wireless Facilities Are A Towering Problem," 40 *Wm. & Mary L. Rev.*, 975, 979 (1999).

Regrettably, neither is the case here, as further demonstrated below. Rather, this is a case where Congress has violated the Tenth Amendment by compelling state-created entities to "enact and enforce a federal regulatory program," (*New York*, *supra*, 505 U.S. at 151,[7] *quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 288 (1981)), thereby evading Congressional accountability to the public (*New York*, 504 U.S. at 168-69) and "restrict[ing] those political processes which can obviously be expected to bring about the repeal of undesirable legislation. . . ." *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.10 (1938).

Petitioners do not ask the Court to act as an ultimate arbiter of whether the federal standards are desirable or undesirable, but only to grant review to determine whether the *manner* in which they have been imposed upon localities is in conformity with the democratic structures of the constitution established by the Framers. *Cf.* Calabresi, "Textualism and the Countermajoritarian Difficulty," 66 *Geo.Wash.L.Rev.* 1373, 1391 (1998) (Supreme Court enforcement of jurisdictional lines of federalism and separation of power is "democracy enhancing" and "has the potential to make our system of Madisonian democracy function better.")

This Court has recently granted certiorari in Tenth Amendment cases where, arguably, the significance of the underlying issues pales in comparison to that presented here. For example, in *Printz*, the federal regulation in question consisted of relatively innocuous, temporary requirements that local chief law enforcement officers perform background checks on would-be purchasers of firearms. 521 U.S. at 903-04. Similarly, in *Reno v. Condon*, the Court granted certiorari to review the Tenth Amendment ramifications of the Driver's

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[7] The holding in *New York* is fully applicable to *local* subdivisions of states, as this Court made clear in *Printz*, which invalidated legislation impressing local chief law enforcement officers into federal service.

Privacy Protection Act, 528 U.S. ___, 120 S. Ct. 666, 671 (2000). While *Printz* and *Reno* undoubtedly involved important issues, of still greater importance are those presented in the case at bar.

THE 10th AMENDMENT PRESERVES THE SYSTEM OF DUAL SOVEREIGNTY ESTABLISHED BY THE FRAMERS

A recent line of decisions handed down by this Court has breathed new life into the Tenth Amendment. Chief among these are the decisions in *New York v. United States* and *Printz v. United States*. In *New York* and *Printz*, this Court forcefully reconfirmed the long-standing principle that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" 505 U.S. at 161 *quoting Hodel, supra*, 452 U.S. at 288. *See also New York, supra*: "the Constitution has never been understood to confer upon Congress the ability to require states to govern according to Congress' instructions." *citing Coyle v. Smith*, 221 U.S. 559, 565 (1911); *Printz*, 521 U.S. at 925: ". . . the Federal Government may not compel the states to implement, by legislation or executive action, federal regulatory programs."[8]

The historical record conclusively establishes that the Framers "designed a system in which the state and federal governments would exercise concurrent authority over the people — who were, in Hamilton's words, 'the only proper objects of government.'" *Printz*, 521 U.S. at 919-20, *quoting The Federalist No. 15; Accord, Alden, supra*, 527 U.S. at 714.

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[8] Commandeering the legislative power of the states to serve federal ends is antithetical to the "system of dual sovereignty" established by "the Framers, who explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states." *Printz*, 521 U.S. at 918, 920, *quoting Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *New York, supra*, 505 U.S. at 166.

Moreover, any act which threatens to "compromise the structural framework of dual sovereignty" is "categorically" unconstitutional and "no comparative assessments of the various interests [involved] can overcome that fundamental defect." *Printz*, 521 U.S. at 932-33.

RESPECTING THE SPIRIT OF DUAL SOVEREIGNTY PRESERVES DEMOCRACY

While the categorical rule may appear doctrinaire and inflexible, it serves vital constitutional purposes, *inter alia*, by preserving the accountability of elected officials to the electorate — the very basis of democratic government. As explained in *New York*:

> . . . where the Federal Government directs the States to regulate, it may be *state officials who will bear the brunt of public disapproval*, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. (505 U.S. at 169) (Emphasis added.)

Accord Petersburg, 205 F.3d at 701. *See also Printz*, observing that where state governments are forced to implement a Federal program, state officials are "put in a position of taking the blame for its burdensomeness and its defects." (521 U.S. at 930, *quoting* Merrit, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1580, n. 65 (1994)).[9]

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[9] *See also Alden*, 527 U.S. at 715: "When the Federal Government asserts authority over a State's most fundamental political process, it strikes at the heart of the political accountability so essential to our liberty and republican form of government."

ARGUMENT

POINT I

CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT AND THE SECOND CIRCUIT ON THE CONSTITUTIONALITY OF SECTION 704 OF TELECOMMUNICATIONS ACT OF 1996

The Fourth Circuit Decision

In *Petersburg*, *supra*, a divided panel of the Fourth Circuit reversed the District Court and upheld a decision of the Board Supervisors of Nottaway County, Virginia denying an application to erect a cellular telephone tower. Applying the federalism principles elucidated above, Fourth Circuit Judge Niemeyer wrote a concurring opinion declaring that Section 704 of the Telecommunications Act "'commandeers' the County's legislative process and is therefore unconstitutional under the Tenth Amendment." 205 F.3d at 705 *quoting New York*, 505 U.S. at 175.

Judge Niemeyer recognized that the functions of the local zoning board were legislative in nature. 205 F.3d at 699. The Telecommunications Act therefore effectively imposes federal standards on this legislative process.

As Judge Niemeyer recognized:

> through a compromise involving a partial preemption approach, [Congress] enacted § 704(a) of the Telecommunications Act, imposing federal standards on state and local legislative processes, thus leaving state and local legislative boards responsible and accountable for any fall-out in making siting decisions. Through this blend of assigned power, Congress apparently believed it could effect a federal policy promoting the erection of

> telecommunications towers, while preserving local interests in the process. But this particular blend erases the constitutional lines dividing power between the federal and state sovereigns and therefore becomes a categorical violation of the Tenth Amendment.

(205 F.3d at 705-06)[10]

The Second Circuit Decision

Despite the serious federalism issues raised by the Telecommunications Act, the Second Circuit in this case brushed aside petitioners' constitutional arguments in a single paragraph. *Cellular Phone Task Force*, *supra*, 205 F.3d at 96. (A-21) According to the Circuit Court, Congress did not commandeer local authorities in violation of *Printz* and *New York*, because "[s]tate and local governments are [purportedly] not required to approve or prohibit anything" under the statute. (*Id.*) (A-21) This conclusion is directly contrary to the Second Circuit's own jurisprudence, which demonstrates that local authorities are routinely required to approve tower construction under the Act.

For example, in *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999), the Second Circuit reviewed a decision by a local town board on Long Island to deny permits to construct two wireless communication "cell sites." At public hearings on the applications before the board, the "vast majority" of speakers "expressed concern that the rfes [radio frequency emissions] emitted by the cell sites might

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[10] By its express terms, Judge Niemeyer's opinion does not deal with subsection (iv) of Section 332(c)(7)(B), which is at issue here. Nonetheless, his reasoning is fully applicable to the case at bar. No less than subsection (iii), subsection (iv) imposes federal standards on local zoning boards and therefore contravenes the Tenth Amendment under the holding espoused by Judge Niemeyer — a holding which is in direct conflict with the decision of the Second Circuit in this case.

cause cancer." (*Id.* at 492.) Finding that the health concerns expressed by residents could not constitute substantial evidence under the Telecommunications Act and that the remaining evidence was insufficient to support the board's decision, the Second Circuit expressly held "that an injunction ordering the Town to issue the permits was an appropriate remedy." (166 F. 3d at 497.) Thus, despite the town board's obvious misgivings about the health effects of the cell sites, it was *compelled* by the Telecommunications Act to exercise its legislative authority in accordance with the mandate of the Federal government, rather than its own policy preferences, and to approve construction. This is precisely the unconstitutional result which the Second Circuit panel in *this* case said would *not* come about under the Act. Clearly, the Second Circuit was wrong and ignored its own prior case law in this field.

Nor is *Oyster Bay* an aberration. The Court explicitly noted that "the majority of district courts which have heard these cases have held that the appropriate remedy is injunctive relief, in the form of an order to issue the relevant permits." (*Id. citing Iowa Wireless Servs., v. City of Moline* 1998 WL 879518 (C.D. Ill.) at *9 (ordering defendant to grant plaintiff a special use permit "with all deliberate speed"); *OmniPoint Corp. v. Zoning Hearing Bd. of Pine Grove, TP*, 20 F. Supp. 2d 875, 881-92 (E.D. Pa. 1998) (ordering zoning board to issue requested special exception permit and declining to remand because to do so would "frustrate the TCA's intent to provide aggrieved parties full relief on an expedited basis"), *aff'd*, 181 F.3d 403 (3rd Cir. 1999); *Illinois RSA No. 3 v. County of Peoria*, 963 F. Supp. 732, 747 (C.D. Ill. 1997) (concluding that injunction directing defendant to issue permit is appropriate relief under TCA); *BellSouth Mobility Inc. v. Gwinnett County Georgia*, 944 F. Supp. 923, 929 (N.D. Ga. 1996) (granting plaintiffs' request for writ of mandamus and ordering defendant to grant plaintiffs' requested permit).

These cases also conclusively refute the Second Circuit's suggestion that Congress was merely exercising its "authority to offer states the choice of regulating the activity according to federal standards or having state-law pre-empted by federal regulation." (205 F.3d at 96, *quoting New York*, 505 U.S. at 167.) (A-21) As *Oyster Bay* and the cases cited therein demonstrate, *there is no choice at all*. If the local authorities fail to follow the federal standards on their own, the federal courts will compel them to do so. *Accord Petersburg*, 205 F.3d at 702.

This conclusion is borne out by the legislative history of Section 704 cited above, which demonstrates that Congress did not leave local governments with a choice, but consciously chose to require them to continue to consider cell tower zoning issues in conformity with *federal* standards.

In addition, Judge Niemeyer recognized that any choice offered to local authorities under the Act is at best a Hobson's choice:

> The choice suggested — that Nottoway County comply with § 704(a) of the Telecommunications Act or end its role as a land-use regulator — is no less coercive than the choice offered the states in *New York*. Indeed, it is not a choice at all. The Telecommunications Act does not suggest it, and it cannot be implied except in an ontological sense: one has a "choice" to avoid obeying a governmental body by ending his own existence. To suggest that a local body withdraw from land-use regulation and leave the construction of structures in the community to the whims of the market is nothing short

> of suggesting that it end its existence in one of its most vital aspects. *Petersburg*, 205 F.3d at 703. (*Id.*) [11]

The concurrence went on to note that "land use decisions are a core function of local government," and described the chaos that would follow should local authorities "abandon their land use power." (*Id.*) Requiring local zoning boards to forego this fundamental power violates the residuary inviolable sovereignty retained by the states. *Alden*, 527 U.S. at 715.

Petitioners respectfully submit that Judge Niemeyer's interpretation is clearly the more persuasive, and that the Second Circuit's reading of the statute disregards its obvious effect. Plainly, to prohibit local authorities from disapproving cell tower construction based on health concerns has exactly the same effect as expressly requiring them to approve such construction.

Finally, the Second Circuit declared that it had "no doubt" that Congress possessed the legislative authority under the Interstate Commerce Clause "to preempt state and local governments from regulating the operation and construction of a national telecommunications infrastructure. . . ." (205 F.3d at 96.) Evidently, the Court considered this to be the decisive factor establishing the constitutionality of the Act. However, the conclusion that Congress has legislative jurisdiction under the commerce clause to regulate telecommunications simply does not resolve the constitutionality of the act under the Tenth Amendment. As this Court recently observed:

> In *New York* and *Printz*, we held federal statutes to be unconstitutional not because Congress lacked legislative

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[11] In *New York*, states were given the coercive "choice" of "either accepting ownership of [radioactive] waste, or regulating according to the instructions of Congress." (505 U.S. at 175.)

> authority over the subject matter, but *because those statutes violated the principles of federalism contained in the Tenth Amendment.*

Reno v. Condon, 120 S. Ct. at 671. (Emphasis added.)

POINT II

THE SECOND CIRCUIT DECISION CONFLICTS WITH RECENT DECISIONS OF THIS COURT PRESERVING THE INVIOLABLE SOVEREIGNTY RETAINED BY THE STATES

The Second Circuit decision conflicts with the Supreme Court's recent decision in *Alden v. Maine*, 527 U.S. at 715, which held that in exercising its enumerated powers, *the Federal Government may not infringe upon the "residuary and inviolable sovereignty" retained by the States* under the Constitution (*quoting The Federalist No. 39* at 245).

As the Court recognized in *Alden*: "the founding document 'specifically recognizes states as sovereign entities.'" (*Id. quoting Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1991). Therefore, under the Constitution, "Congress is bound to treat the states in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.") *Alden*, 527 U.S. at 749.

An attribute of such inviolable sovereignty is the duty to ensure that citizens are not left unprotected in the face of potentially lethal threats to their lives, health and safety. This is not merely the State's right, it is arguably the most fundamental obligation of government and the cornerstone of the social compact as understood by the Framers themselves.

Relevant historical sources (*cf. Alden*, 527 U.S. at 713, 715-16) confirm that the preservation of life was considered *a paramount duty of government* and one of the key reasons

it exists. No less a personage than John Locke, the esteemed political writer whose thought so influenced the Framers, declared that the "great and chief end . . . of men's uniting into commonwealths, and putting themselves under government" is for "the mutual preservation of their *lives*, liberties and estates." Locke, *Second Treatise of Government*, Sections 123, 124. (Emphasis added.) Speaking through Jefferson, the founding generation incorporated Locke's principle into the Declaration of Independence itself, which declares that securing life was one of the three primary purposes for which "Governments are instituted among men."

So basic is this obligation, plaintiffs submit that it is of equal stature with sovereign immunity from lawsuits, and with those "political functions" which "lie[ ] at the heart of representative government" and are thus "reserved to the states under the Tenth Amendment." *Gregory*, *supra*, 501 U.S. at 463.[12]

The Federal Government may, of course, exercise the power to set public health standards in areas relating to interstate commerce. However, where it has defaulted on its obligation to protect public health, the Federal Government may not simultaneously *prevent the States from taking action to do so*. Such preemption would be irreconcilable with the "dignity and essential attributes inherent in" the State's status as sovereigns. (*Alden*, 527 U.S. at 714) Yet that is precisely what the Telecommunications Act and the FCC regulations

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[12] In the present day, recent decisions of this Court also confirm that the power to protect the people from threats to health and safety is part of the traditional powers retained by the States. *U.S. v. Morrison*, 529 U.S. ___, 120 S.Ct. 1740 (2000) (confirming that the Founders reposed the plenary police power in the States.) Indeed, this Court has very recently reconfirmed that the field of health care "is a subject of traditional state regulation . . ." *Pegram v. Herdich*, 530 U.S. ___, 120 S. Ct. 2143, 2158 (2000), *quoting New York State Conference of Blue Cross and Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 654-655 (1995).

do, by leaving citizens exposed to the potential health effects of the radio frequency radiation from cellular towers and by simultaneously tying the hands of state and local officials who wish to intercede to protect the well-being of their citizens.

Based on the administrative record before the Second Circuit, it is apparent that the FCC has been hobbled by Congress in its ability to update emissions standards and to take meaningful regulatory steps to safeguard the public. As the scientific literature amply demonstrates, the level of Federal research on this issue by EPA is wholly inadequate to this day, at a time when findings by researchers around the world demonstrate the pressing need for a heavily-funded federal human health-oriented research program.[13]

The power and responsibility to protect public health and safety cannot lapse. When the Federal Government fails to exercise it, the power necessarily reverts to the people of the States as part of their inviolable sovereignty. This principle is also enshrined in the Declaration, wherein one of the chief complaints against the British Crown is that the king impeded

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[13] For example, an 18-year study by Dr. Bruce Hocking in Sydney, Australia found that children living close to broadcast towers for four TV stations and an FM radio station suffered twice as many deaths from leukemia as children residing farther away. The radiation levels were no more than 8 microwatts per square centimeter, 125 times lower than the 1996 FCC standards. (Hocking B, Gordon IR, Grain HL, Hatfield GE, *Cancer Incidence and Mortality and Proximity to TV Towers. Med J Aust* 165(11-12):601-605, 1996.)

Adult leukemias were nine times higher than expected within the first half kilometer of a BBC TV and FM transmitter in Sutton Coldfield near Birmingham, England. Dr. Helen Dolk and associates observed that the leukemia incidence was almost double expected levels within two kilometers. The maximum radiation level measured was only 5.7 microwatts per square centimeter. (Helen Dolk, *et al. Cancer Incidence Near Radio and Television Transmitters in Great Britain. American Journal of Epidemiology*, Vol. 145, No. 1 (January 1997) pp. 1-9.)

the passage of "laws most wholesome and necessary to the public good" by "refusing his assent" and by "dissolving colonial legislatures":

> whereby the Legislative Powers, incapable of annihilation . . . returned to the People at large for their exercise. . . .

The provision of the Telecommunications Act forbidding States from filling the regulatory vacuum left by Congress and the FCC is therefore repugnant to the Tenth Amendment and basic principles of American democracy.

Congress Has Failed to Fund EPA Research Into Biological Effects of RF Emissions on Human Health

The real problem here is that the most recent FCC standards set in 1996, are still based on thermal effects, despite newer information coming from scientific sectors largely outside of the U.S. The current FCC standards were adopted from decades-old research reviewed by the National Council on Radiation Protection (*NCRP Report No. 86*, issued April 2, 1986), and from the American National Standards Institute (*EEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3kHz to 300 GHz*, approved Sept. 26, 1991, with a cut-off date for scientific papers of December, 1985). Both Professional agencies have a 5-to-7 year built-in time lag in their review process, and their respective RF committees are comprised almost entirely of physicists, engineers and bioelectromagnetics researchers — not professionals from the public health sector. In other words, dated, inappropriate research, reviewed by authorities from inappropriate professions, is being used to reach conclusions about public safety concerning radio frequency radiation. Why has there been no better updating of the FCC standards? The answer is obvious: because

Congress has not appropriated adequate funds to conduct non-thermal research by the key federal agency — EPA.

The Court of Appeals premised its refusal to disturb the FCC regulations in large part on the Court's confidence in the Environmental Protection Agency (EPA) keeping the FCC informed on new developments which would require changes in the FCC's existing maximum emissions standards. As the Court of Appeals said:

> Moreover, it was not arbitrary and capricious for the FCC to conclude that it need not supply the new evidence to the other federal agencies with expertise in the area. It could reasonably expect those agencies to keep abreast of scientific developments in carrying out their missions. For instance, the EPA had participated not only in the hearings and comments leading to the promulgation of the Guidelines, but also had been on the verge of releasing its own draft guidelines pertaining to the health effects of RF radiation in 1996. *It was fully reasonable for the FCC to expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration, particularly because the EPA had been assigned the lead role in RF radiation health effects since 1970. See* 42 U.S.C. § 2021(h).

(205 F.3d at 91) (A-10) (Emphasis added.)

The Court's reliance on the EPA was technically correct but substantively naive. What the Court did not realize was that *Congress terminated funding for radiation research by EPA* in 1996, and no staff has been available at EPA to conduct such research for the past five years.

This Court can properly take judicial notice of the federal budget levels for this agency. Reproduced on the following page is a "Summary of EPA Budget and Staffing for RF Radiation Activities from FY 1990-2000" recently supplied

Summary of EPA Budget and Staffing for RF Radiation Activities from FY1990–2000

(Extramural Dollars Only)

FY	90	91	92	93	94	95	96	97	98	99	00
FTE	2.3	2.2	2.1	2.1	2	2	0.5	0.5	0.5	0.5	0.5
$(K)	$0	$40	$25	$543[a]	$73[b]	$140[c]	$0	$0	$25[d]	$0	$0

[a] Includes grant funds ($510,000) under EPA/NIEHS Interagency Agreement DW75935939.

[b] Includes funds ($50,000) for Cooperative Agreement (CX823714) with the National Council on Radiation Protection and Measurements (NCRP).

[c] Includes funds ($50,000) for Cooperative Agreement (CX823714) with NCRP.

[d] $25K completes total funding ($125,000) for Cooperative Agreement (CX823714) with NCRP.

by the agency in response to a request from Senator Joseph I. Lieberman of Connecticut. It will be seen that only one-half of a staff member is presently assigned to perform EPA's "lead role" in RF radiation health effects, and such has been the case since 1995. It will also be seen that *total* research expenditures in the five years since 1995 amount to a final payment of *$25,000* on a cooperative agreement entered into with NCRP in 1994. Nothing more. In contrast, the EPA research expenditures from 1990 through 1995 totaled *$821,000*. While the Court of Appeals was theoretically correct in its reliance on EPA's lead research responsibility, in practical terms the Court was dead wrong. There is *no* Congressionally funded research into the biological effects of cellular tower RF emissions in the agency to which Congress assigned the "lead role" in 1970.

This is a perfect example of lack of accountability. Citizens should be allowed to decide whether inaction by their own elected Congressional delegations is the result of large campaign contributions and intense lobbying from the telecommunications industry.[14]

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[14] The Court can take judicial notice of the official reports filed with the Federal Elections Commission (FEC), summarized on the Internet website of the Center for Responsive Politics (CRP) (website: www.crp.org). At the time the Telecommunications Act of 1996 was under discussion in 1994-95, political action committees for local and long distance phone companies contributed over $4 million to key members of Congress (data from CRP reported in *USA Today* issue of October 16, 1995).

During the period of actual passage of the Act, FEC filings, together with lobbying reports filed with the House and Senate, showed substantially greater expenditures for 1996-97, amounting to a grand total of $29,425,097.

For the current Congress, campaign contributions from telephone utilities reported to the FEC (as of August 30, 2000, even before the start of final election campaigning): $5,503,169.

These financial pressures on key Congressional committee members may — or may not — explain the failure of Congress to fund ongoing research into the potential hazards to human health resulting from the FCC's maximum RF emissions standards for wireless telecommunications facilities. But the stark fact remains that *no such federally-funded research is being conducted by EPA*, and the main premise of the Court of Appeals decision was in error.

That may please the telecommunications business interests, but is it a responsible approach to federalism? We say it is not what the Framers of the Constitution intended, and the preemption provisions in the Act should be declared unconstitutional.

CONCLUSION

The Petition for Certiorari should be granted.

Dated: New York, New York
September 7, 2000

WHITNEY NORTH SEYMOUR, JR.*
PETER JAMES CLINES
LANDY & SEYMOUR
Attorneys for Petitioners
363 Seventh Avenue, Room 1300
New York, New York 10001
(212) 629-0590

* *Counsel of Record*

APPENDIX

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

CELLULAR PHONE TASKFORCE, *et al.*,

Petitioners,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION, NATIONAL ASSOCIATION OF BROADCASTERS, ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC., ELECTROMAGNETIC ENERGY ASSOCIATION, and AT&T WIRELESS SERVICES, INC.,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

Nos. 97-4328(L); 98-4003(Con); 98-4005(Con); 98-4025(Con); 98-4122(Con).

Argued April 5, 1999
Decided Feb. 18, 2000

James R. Hobson, Esq., Donelan, Cleary, Wood & Maser, P.C., Washington, DC, (Mark F. Wilson, Esq., The Communications Workers of America, Washington, DC, *on the brief*), for *Ad-Hoc* Association, The Communications Workers of America, AFL-CIO, CLC and CWA Local 7810, *Petitioners*.

John E. Schulz, Esq., San Rafael, CA, for Cellular Phone Taskforce, *Petitioners*, Joel Marcus, Counsel, Federal Communications Commission, Washington, DC, (Joel I. Klein,

Assistant Attorney General, Catherine G. O'Sullivan, Andrea Limmer, United States Attorneys, Christopher J. Wright, General Counsel, Daniel M. Armstrong, Associate General Counsel, C. Grey Pash, Jr., Counsel for the FCC, Washington, DC, *on the brief*), *for Respondents*.

Howard J. Symons, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Washington, DC, (Bruce D. Sokler, Esq., Sara F. Seidman, Michelle M. Mundt, *on the brief*; Douglas I. Brandon, Esq., AT&T Wireless Services, Inc., Michael F. Altschul, Cellular Telecommunications Industry Association, Washington, DC), for AT&T Wireless Services, Inc., and Cellular Telecommunications Industry Association, *Intervenors*,

John I. Stewart, Jr., Esq. and William D. Wallace, Esq., Crowell & Moring, LLP, Washington, D.C., submitted a brief for Electromagnetic Energy Association, National Association of Broadcasters, and Association for Maximum Service Television, Inc., *Intervenors*,

Peter James Clines, Esq., New York, NY, submitted a brief for Gabriel Seymour, First Selectman, Town of Canaan, Connecticut, *et al.*, *Amici Curiae on behalf of Petitioners*.

Before: WALKER, NEWMAN, and SACK,

Circuit Judges.

JOHN M. WALKER, *Circuit Judge*:

Petitioners Cellular Phone Taskforce ("CPT") and *Ad-Hoc* Association of Parties Concerned About the Federal Communications Commission Radio Frequency Health and Safety Rules ("AHA"), joined by numerous other individuals and groups, appeal from two final opinions and orders in which the Federal Communications Commission (the "FCC") promulgated guidelines for health and safety standards of radio

frequency ("RF") radiation, established streamlined procedures for meeting requirements under the National Environmental Policy Act for FCC licensees that are in compliance with the guidelines, and retained the exclusive ability to regulate the relevant radio facility operations. *See* Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 11 F.C.C. Rcd. 15123, 1996 WL 926565 (1996) ("First Order"); Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, 12 F.C.C. Rcd. 13494, 1997 WL 522796 (1997) ("Second Order").

AFFIRMED.

BACKGROUND

In 1985, after seeking consensus among participating experts and after public notice and comment, the FCC adopted guidelines for human exposure to RF radiation from FCC-regulated transmitters and facilities. The guidelines were required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and the Council on Environmental Quality ("CEQ") regulations promulgated thereunder, *see* 40 C.F.R. §§ 1500.1 *et seq.* In promulgating its rules, the FCC adopted the guidelines issued in 1982 by the American National Standards Institute ("ANSI"), a recognized standard-setting organization. *See* Biological Effects of Radiofrequency Radiation, 100 F.C.C.2d 543, 1985 WL 260091 (1985).

In November 1992, ANSI issued a more restrictive health standard for RF exposure[1] than its 1982 standard. The new ANSI standard prompted the FCC to propose updating its

[1] This standard was originally developed by the Institute of Electrical and Electronic Engineering ("IEEE"), and a subgroup within the IEEE monitors the continued validity of the standard. For convenience, we will not discuss how the responsibilities are divided between ANSI and IEEE, but refer to both as ANSI throughout this opinion.

existing guidelines. *See* Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 8 F.C.C. Rcd. 2849, 1993 WL 757412 (1993). In the 1993 proposal that was sent out for notice and comment, the FCC noted that the 1992 ANSI standard was less restrictive than two other standards: those issued by the congressionally chartered National Council on Radiation Protection and Measurements ("NCRP"), and those proposed by the International Radiation Protection Association.

During the comment period, the FCC received submissions from, *inter alia*, the Environmental Protection Agency ("EPA"), the Food and Drug Administration ("FDA"), the Occupational Safety and Health Administration ("OSHA"), and the National Institute for Occupational Safety and Health ("NIOSH"). Ultimately, the FCC adopted guidelines that combined the NCRP standard with the ANSI standard (the "Guidelines"). These Guidelines — part of the First Order that petitioners challenge in this case — mostly incorporate the maximum permitted exposure ("MPE") limits suggested by the NCRP, together with certain other features of the ANSI standard. In particular, the FCC accepted ANSI's suggestion to exempt certain classes of facilities from having to file routine Environmental Assessments ("EAs") setting forth their compliance with the MPE limits in the Guidelines. The exempt category consists of tower-mounted telecommunications antennae 10 meters or higher above ground and rooftop antennae emitting less than 1000 watts of power. The FCC elected to exempt such facilities after determining that they pose no risk of exposing humans to RF radiation in excess of MPE levels.

Several parties filed petitions for reconsideration of the FCC's First Order. Some sought slightly stricter standards, and others sought to persuade the FCC to adopt the more restrictive ANSI standard wholesale. The FCC granted the petition for rehearing but declined to adopt an unmodified

ANSI standard or to tighten its own guidelines, except in minor respects.

While the FCC was considering the proposed guidelines, Congress passed the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (the "Act"), several provisions of which affected the FCC's ongoing proceedings. In particular, the Act preempted state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe. *See* 47 U.S.C. § 332(c)(7)(B)(iv). In the Second Order that is at issue in this case, the FCC announced, *inter alia*, a rule that prohibited state and local governments from regulating any personal wireless service facilities based upon perceived health risks posed by RF emissions as long as the facilities conformed to the FCC Guidelines regarding such emissions.

Petitioners' appeal raises a plethora of claims that can be grouped into five categories: Petitioner Cellular Phone Taskforce ("CPT") argues (1) that the Guidelines violate the Americans with Disabilities Act and the Rehabilitation Act; and both petitioners argue that (2) the FCC was arbitrary and capricious in enacting the Guidelines in violation of the Administrative Procedure Act, specifically 5 U.S.C. § 706(2)(A); (3) the FCC violated NEPA by failing to prepare an environmental impact statement; (4) the FCC exceeded its powers when it prohibited state and local governments from regulating the operation of personal wireless service facilities that conformed to the FCC's RF standards; and (5) the same prohibition, found at 47 U.S.C. § 332(c)(7)(B)(iv), is unconstitutional both on its face and as applied. We will consider each group of claims in turn.

DISCUSSION

I. *Americans With Disabilities Act and Rehabilitation Act Claims*

Petitioner CPT's claims that the Guidelines violate the Americans with Disabilities Act ("ADA"), *see* 42 U.S.C. § 12101 *et seq.*, and Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, were not the subject of a final order by the FCC. While they were raised before a staff member, the Chief of the Office of Engineering and Technology, they were not presented to the Commission. Decisions of agency staff are not directly appealable final orders. Our review is limited to final orders of the FCC pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(a). *See American Broad. Cos. v. FCC*, 682 F.2d 25, 30 (2d Cir. 1982); *see also* 47 U.S.C. § 155(c)(7) ("The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection."); *International Telecard Assoc. v. FCC*, 166 F.3d 387, 387-88 (D.C. Cir. 1999) (per curiam).

While we have said that the foregoing exhaustion requirement is not inflexible, we generally do not permit petitioners to raise an issue for the first time on appeal without giving the Commission an opportunity to address it, particularly where the issue is a novel one. *See National Black Media Coalition v. FCC*, 791 F.2d 1016, 1021 (2d Cir. 1986). The novelty of the claim raised here, that the Guidelines impermissibly discriminate against handicapped persons in violation of the ADA and the Rehabilitation Act, makes initial Commission determination both necessary and appropriate. We therefore dismiss that part of the appeal relating to petitioner CPT's ADA and Rehabilitation Act claims.

The remaining claims were the subject of a final order by the Commission and thus are properly before us.

II. *The Administrative Procedure Act Claims*

Petitioners claim that the FCC in adopting the Guidelines violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, when it arbitrarily and capriciously (1) failed adequately to consider the evidence of harmful effects from non-thermal levels of radiation; (2) ignored expert recommendations that would restrict the regulatory regime; (3) ignored critical factors bearing upon MPE levels; and (4) failed to account for the cumulative effects of radiation in creating categorical exemptions for certain facilities from routine environmental assessment. We disagree.

We may reverse an agency decision and informal rulemaking only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see, e.g., National Black Media Coalition v. FCC*, 822 F.2d 277, 280 (2d Cir. 1987). An agency's factual findings must be supported by substantial evidence which "has been construed to mean less than a preponderance, but more than a scintilla." *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951) (internal quotation marks omitted). "The reviewing court must take into account contradictory evidence in the record, but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490, 523, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) (internal citations and quotation marks omitted). When an agency makes a decision in the face of disputed technical facts, "[a] court must be reluctant to reverse results supported by . . . a weight of considered and carefully articulated expert opinion." *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453,

463, 92 S.Ct. 637, 30 L.Ed.2d 600 (1972). In evaluating agency reasoning, we must be satisfied that the agency examined the relevant data and established a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks omitted). The agency's action should only be set aside where it

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the products of expertise.

Id. With these general principles in mind, we turn to petitioners' specific claims under the APA.

A. *Non-Thermal Effects of Radiation*

The parties do not dispute that RF radiation at excessive levels has thermal effects and that the ANSI and NCRP standards and thus the Guidelines are premised on such effects. Petitioners claim that the Guidelines are arbitrary and capricious because they fail to account for *non-thermal* effects of RF radiation. In support of their claim, petitioners argue that (1) neither the ANSI nor the NCRP sufficiently considered evidence of non-thermal effects and it was therefore arbitrary and capricious for the FCC to rely on the ANSI and NCRP standards; (2) the FCC did not fulfill its duty independently to evaluate new evidence filed during the reconsideration round; (3) the FCC failed to elicit expert testimony during the reconsideration round; and (4) the FCC's decision not to lower the MPE levels below the maximum permitted thermal levels failed to account for the scientific uncertainty surrounding RF harm. These arguments are unavailing.

In basing its guidelines on a combination of the ANSI and the NCRP standards, the FCC stated that:

> [The] guidelines are based on recommendations of expert organizations and federal agencies with responsibilities for health and safety. It would be impracticable for us to independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a safety hazard, and th[en] adopt stricter standards than those advocated by federal health and safety agencies. This is especially true for such controversial issues as non-thermal effects and whether certain individuals might be "hypersensitive" or "electrosensitive."

Second Order, 12 F.C.C. Rcd. 13494 at ¶ 31, 1997 WL 522796. This decision was not arbitrary and capricious. In promulgating their standards, both the ANSI and the NCRP considered non-thermal effects. The ANSI found that "no reliable scientific data exist indicating that [n]onthermal . . . exposure may be meaningfully related to human health" and concluded that its exposure standard "should be safe for all." The NCRP found that the existence of non-thermal effects "is clouded by a host of conflicting reports and opinions." In the face of conflicting evidence at the frontiers of science, courts' deference to expert determinations should be at its greatest. *See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). All of the expert agencies consulted were aware of the FCC's reliance on the ANSI and NCRP standards. Each had been advised of such evidence of non-thermal health effects as may have existed and still found the FCC's approach to be satisfactory.

Under those circumstances it was reasonable for the FCC to continue to rely on the ANSI and NCRP standards absent new evidence indicating that the fundamental scientific

understanding underlying the ANSI and NCRP standards was no longer valid. At most, the newly submitted evidence established that the existence of non-thermal effects is "controversial," and that room for disagreement exists among experts in the field. After examining the evidence, the FCC was justified in continuing to rely on the ANSI and NCRP standards.

Furthermore, the FCC satisfied itself that there was a mechanism in place for accommodating changes in scientific knowledge. It found that both the ANSI and the NCRP had "committees that are working on revisions of their respective exposure guidelines," and that "ongoing research in a number of areas may ultimately result in changes in the fundamental understandings upon which [the ANSI] and the NCRP [standards] are based," and that it would "consider amending [its] rules at any appropriate time if these groups conclude that such action is desirable." Because the new evidence consisted of publicly available scientific papers, the FCC could reasonably expect it to be considered by the ANSI and the NCRP standing committees that were working on revising their standards.

Moreover, it was not arbitrary and capricious for the FCC to conclude that it need not supply the new evidence to the other federal agencies with expertise in the area. It could reasonably expect those agencies to keep abreast of scientific developments in carrying out their missions. For instance, the EPA had participated not only in the hearings and comments leading to the promulgation of the Guidelines, but also had been on the verge of releasing its own draft guidelines pertaining to the health effects of RF radiation in 1996. It was fully reasonable for the FCC to expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration, particularly because the EPA had been assigned the lead role in RF radiation health effects since 1970. *See* 42 U.S.C. § 2021(h). Because the newly submitted material consisted of publicly available

scientific articles of the type monitored by the EPA and other agencies and such material was insufficient to invalidate the assumptions underlying the Guidelines, it was not arbitrary and capricious for the FCC to conclude that further consultation with the expert agencies was unnecessary.

Petitioners criticize the FCC for not adopting the NCRP's recommendations for stricter standards in situations of exposure to deep modulated extremely low frequency ("ELF") carrying waves. The NCRP had recommended that the exposure criteria in such situations be the same for occupational exposures as for the general population in order to provide for an additional safety margin. It was not arbitrary and capricious for the FCC to reject the NCRP recommendation. The scientific data were inconclusive on the dangers presented by such radiation, and thus did not mandate a determination different from that reached by the FCC. The NCRP itself had concluded that the existence of modulation effects was unclear. The EPA had recommended that "[w]hile studies continue to be published describing biological responses to non-thermal ELF-modulated RF radiation, the effects information is not yet sufficient to be used as a basis for exposure criteria to protect the public against adverse human health effects." ANSI had likewise found that "no reliable scientific data exist indicating that . . . modulation-specific [disease-related conditions] of exposure may be meaningfully related to human health."

Also unavailing is petitioners' argument that the FCC is required to apply the principle against uncertainties as adopted by the Nuclear Regulatory Commission to limit radiation to levels "as low as is reasonably achievable." *See, e.g., Nuclear Regulatory Commission*, 10 C.F.R. §§ 20.1003, 20.1101(b), (d); *Department of Energy*, 10 C.F.R. § 835.2(a)(2).

The argument that the FCC should create greater safety margins in its guidelines to account for uncertain data is a

policy question, not a legal one. As a policy matter, an agency confronted with scientific uncertainty has some leeway to resolve that uncertainty by means of more regulation or less. *Compare, e.g., American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 528, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) (approving more stringent regulation when agency "could not obtain the more detailed confidential industry data it thought essential to further precision"), with, *e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) ("[A]n agency reasonably may decline to issue a safety standard if it is uncertain about its efficacy"). *See also Center for Auto Safety v. Federal Highway Admin.*, 956 F.2d 309, 316 (D.C. Cir. 1992). The FCC concluded that requiring exposure to be kept as low as reasonably achievable in the face of scientific uncertainty would be inconsistent with its mandate to "balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." This policy conclusion is neither irrational, arbitrary nor capricious and we decline to disturb it.

B. *Other Expert Recommendations*

Petitioners argue that the Commission arbitrarily ignored or failed to follow expert recommendations that would tighten the standard. Specifically they fault the FCC for (1) adopting a two-tiered MPE level system allowing for higher exposure in "occupational/controlled" situations than in "general population/uncontrolled" situations despite expressions of concern with these definitions by EPA, NIOSH and OSHA; (2) refusing to adopt ANSI's recommendations on induced and contact currents; (3) ignoring the FDA's request that the FCC consider interference with medical devices; and (4) rejecting NISOH's objection to undocumented self-certification of compliance by license applicants. We disagree.

The record shows that the FCC did not ignore any of these substantial comments, but instead provided a reasoned response to each. The FCC found that applying the general-population limits to all situations "would impose significant and unnecessary economic and technical burdens for which adequate justification has not been presented." The FCC elected instead to clarify the differentiation between occupational and general population circumstances. It was not arbitrary and capricious to do so.

With respect to induced contact currents, the FCC concluded that "[b]ecause of the many possible types and configurations of metallic objects that may be near a transmitter," it would be impracticable to demonstrate compliance. And "in view of the continuing questions and difficulties relating to evaluation of induced and contact currents, especially with regard to measurements. . . . we see no practical way to require compliance" with any limits suggested by the parties. However, the FCC "recognize[d] the desirability for limits to be adopted in the future," and promised to "monitor the issues raised . . . [and] revisit this issue" as measuring technology improves. An agency is permitted to consider costs and benefits as well as enforcement issues when establishing rules and regulations. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 54, 103 S.Ct. 2856. The FCC reached a reasoned conclusion to a difficult problem, and was not arbitrary or capricious.

The FCC also did not ignore the FDA's request for rules dealing with interference with medical devices. The object of the rulemaking was to address biological effects of RF radiation. The FDA acknowledged that interference with medical devices was outside the scope of current rulemaking by "encourag[ing]" the FCC "to continue to work with [the FDA] to address separately this issue." The FCC was justified in limiting its current rules in this way because "agencies . . . need not deal in one fell swoop with the entire breadth of a novel development; instead, reform may take place one step

at a time, addressing itself to the phase of the problem which seems most acute to the regulatory mind." *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (quotation marks, citation and alteration omitted).

As for NIOSH's objections to undocumented self-certification of compliance, it was entirely within the FCC's discretion not to require operators to submit the type of information that would be provided in an EA. *Cf. Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411-12 (D.C. Cir. 1983) (permitting the FCC discretion to determine what information to request in renewal applications for a broadcast license). "Ample sanctions exist for false statements . . . and licensees are well aware of their duty . . . to be scrupulous in providing complete and meaningful information." *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 635 (D.C. Cir. 1978) (quotation marks and citation omitted). The FCC's conclusion that its existing rules concerning licensee certification "have worked adequately in the past and should be continued" was therefore not arbitrary and capricious.

C. *Maximum Permitted Exposure Levels*

In addition to arguing that the MPE levels do not account for non-thermal effects, petitioners argue that the MPE levels are arbitrary and capricious because (1) the exposure levels to hands and wrists were increased without explanation; (2) in setting the MPE level for the general public at one-fifth of the occupational MPE level, the NCRP did not consider individual vulnerabilities among members of the public; and (3) the key assumption pertaining to average exposure time used in establishing the occupational MPEs was fatally flawed because experts within the ANSI standard-setting body disagreed on its validity. These are unavailing arguments.

The increased exposure levels to hands and feet were, in fact, explained by the ANSI: "Considerations that mitigate

these higher permitted local [MPE levels] include relatively high surface-to-volume ratios for these parts of the body, the common experience of relatively large temperature excursions of these parts that normally occur without apparent adverse effects, and the lack of critical function when compared to vital organs."

In establishing the general population MPE level, the NCRP based the lowered MPE level, and thus the increased safety-margin above and beyond the occupational level, on the differences between the two groups. It pointed to the presence among the public of "debilitated or otherwise potentially vulnerable individuals for whom there is presently inadequate knowledge to set firm standards," and the greater risk of harm to the general population due to its higher numbers. The one-fifth level was considered adequate to accommodate these factors, and petitioners have presented no evidence that would render the NCRP's conclusion arbitrary and capricious.

Finally, petitioners challenge the FCC's reliance on experts' divergent assumptions regarding average exposure time. As long as all of the evidence has been considered, as was the case here, a factual finding that is supported by more than a scintilla of evidence is not arbitrary and capricious simply because there is conflicting evidence. *See American Textile Mfr. Inst.*, 452 U.S. at 523, 101 S.Ct. 2478.

D. *Categorical Exclusions*

The Commission concluded that tower-mounted antennae placed more than 10 meters above ground and rooftop antennae transmitting at less than 1000 watts would "offer little or no potential for exposure in excess of the specified guidelines" and that it would not be cost-effective to require routine environmental evaluation of such facilities. First Order, 11 F.C.C. Rcd. 15123, at ¶ 86, 1996 WL 926565. Petitioners argue that these categorical exemptions from having to file

routine EAs are arbitrary and capricious because (1) there may be situations where radiation from such facilities can lead to overexposure behind walls in nearby buildings; and (2) the categorical exemptions ignore constructive interference stemming from multiple antennas or reflections from conductive surfaces, creating "hot spots" where RF radiation levels exceed MPE levels. Missing from the exemption rules, petitioners argue, are rules for when an owner must consider other nearby sources of radiation and rules establishing a public database to facilitate public monitoring. We disagree.

In establishing the categorical exemptions, the Commission conducted a worst-case analysis that considered the effects of multiple antennas mounted on a single tower, and determined that radiation levels in publicly available areas will be many times below MPE levels. The Commission also ensured that combined exposure from multiple towers would be considered by license applicants by charging them with the responsibility of ensuring that their facilities would comply with the MPE rules anywhere their emissions are at least 5% of MPE levels. The FCC's approach was rational. Agencies are permitted to promulgate rules based on cost/benefit analysis. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 54, 103 S.Ct. 2856. In light of the low probability of excluded facilities violating MPE levels, it was reasonable to conclude that there was no need for increased compliance monitoring devices such as a central database. Moreover, the licensees are still responsible for compliance, and an interested person can petition the FCC for review of a site believed to violate the MPE levels. *See* 47 C.F.R. § 1.1307(c).

III. *The NEPA Claims*

Both the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and regulations promulgated thereunder by the Council on Environmental Quality ("CEQ"), generally require agencies subject to NEPA that are about to commit

resources in a federally significant action, including rulemaking, to consider the environmental effects of their actions by preparing either an Environmental Impact Statement ("EIS"), or an Environmental Assessment ("EA") followed by a finding of no significant impact ("FONSI") or an EIS as appropriate. *See City of New York v. Slater*, 145 F.3d 568, 571 (2d Cir. 1998) (per curiam). In promulgating its standards, the FCC admittedly did not complete either a formal EIS or an EA. Petitioners argue that the FCC was required to prepare an EIS in conjunction with its rulemaking. We disagree.

"[W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient." *Environmental Defense Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

The procedures followed by the FCC in the instant rulemaking satisfy the functional compliance test. In considering the environmental impact of its guidelines, the FCC "consult[ed] with and obtain[ed] the comments of any Federal agency which has jurisdiction by law or special expertise with respect to [the] environmental impact involved." 42 U.S.C. § 4332. Both the FCC's First Order and Second Order functionally satisfy the CEQ's requirements for an EA[2] and

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[2] *"Environmental Assessment"*:

> (a) Means a concise public document for which a federal agency is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary. (3) Facilitate preparation of a statement when one is necessary.
>
> (b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the

a FONSI[3] both in form and substance. The FCC considered the environmental impact of its rulemaking, including cumulative effects of radiation from multiple towers. And as discussed above, the findings that radiation at MPE levels would be safe and that some RF facilities could be categorically excluded from routine evaluation (findings akin to a FONSI) were not arbitrary or capricious. Thus, no EIS was required. *See Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1556 (2d Cir. 1992).

We also reject petitioners' argument that by not considering RF interference with medical devices, the FCC has failed to take the required hard look at the environmental consequences of its actions in violation of NEPA. NEPA only requires agencies to consider environmental effects, *i.e.*, alterations to the environment that have a proximate effect on human health. *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774, 103 S.Ct. 1556, 75 L.Ed.2d 534 (1983) (psychological harm resulting from fear that relatives may be subjected to radiation too removed to be environmental harm). Assuming *arguendo* that RF radiation may in certain circumstances interfere with some medical devices in such a way that human health is proximately affected,

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> environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

40 C.F.R. § 1508.9.

[3] *"Finding of No Significant Impact"* means a document by

> a Federal agency briefly presenting the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it.

40 C.F.R. § 1508.13.

thereby rendering interference with medical devices a cognizable environmental harm, the FCC still was not required to consider those environmental effects at this time. Only when individual RF facilities are constructed and operated will the circumstances arise with sufficient specificity to permit meaningful evaluation. As long as all the significant potential environmental impacts are considered in a combination of general and site-specific assessments at the time the facilities are constructed, the requirements of NEPA and the CEQ have been satisfied. *Cf. Environmental Coalition of Ojai v. Brown*, 72 F.3d 1411, 1418 (9th Cir. 1995) (government preparing site-specific EAs did not have to revisit health effects of RF radiation from radar installation considered on a programmatic level).

IV. *The FCC's Preemption of Certain State Regulation*

As noted earlier, while the rulemaking process was underway, Congress passed the Telecommunications Act of 1996, providing, *inter alia*, that

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

47 U.S.C. § 332(c)(7)(B)(iv).

The FCC, as part of its rulemaking, issued a comparable interpretive ruling preempting state and local governments from regulating, based on RF emissions, the operation of personal wireless service facilities that are in compliance with the FCC regulations concerning such emissions. Petitioners claim that the FCC's interpretation is contrary to plain congressional intent. In support of their argument, petitioners point to the deliberate absence of the word "operation" from

the statutory language as evidenced by earlier drafts containing the word.

It is now "well settled that we review deferentially an agency's construction of the statute that it is charged with administering." *Linea Area Nacional de Chile S.A. v. Meissner*, 65 F.3d 1034, 1039 (2d Cir. 1995) (*citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 11, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). We must defer to an agency's reasonable interpretation where the statute is silent or ambiguous with respect to a particular issue. *See Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778; *Fulani v. FCC*, 49 F.3d 904, 910 (2d Cir. 1995). However, "[i]f the statutory language is clear, both the agency and the court must defer to Congress's intent." *Linea Area Nacional*, 65 F.3d at 1039; *see Chevron*, 467 U.S. at 842, 104 S.Ct. 2778.

The FCC has broad preemption authority under the Telecommunications Act. *See City of New York v. FCC*, 486 U.S. 57, 63-64, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-700, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). Congress has circumscribed this authority somewhat, removing from the FCC the power to "limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the *placement, construction and modification* of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A) (emphasis added). States and local governments, therefore, retain these powers subject to explicit limitations described in subsection (B). Appellants argue that the absence of the word "operation" from subsection (B)(iv) preserves for the states the right to regulate *operations* of wireless service facilities as well. Subsection (A) does not, however, preserve their authority to regulate such facilities' operations. Therefore, the absence of the word "operation" from the subsequent limitation on their authority under subsection (B)(iv) does not grant such power.

Section 332(c)(7)(B)(iv) does not amount to clear congressional intent to permit state and local governments to regulate the operation of such facilities. The FCC's interpretation is therefore entitled to deference and, because the FCC's interpretation is reasonable, we are bound to accept it.

V. *Constitutional Challenges*

Finally, we reject petitioners' argument that 47 U.S.C. § 332(c)(7)(B)(iv) facially and as applied violates the Tenth Amendment. The statute does not commandeer local authorities to administer a federal program in violation of the federalism principles embodied in the Tenth Amendment and set forth in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) and *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). State and local governments are not required to approve or prohibit anything. The only onus placed on state and local governments exercising their local power is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of RF radiation. "[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York*, 505 U.S at 167, 112 S.Ct. 2408; *see City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999). We have no doubt that Congress may preempt state and local governments from regulating the operation and construction of a national telecommunications infrastructure, including construction and operation of personal wireless communications facilities. *See City of New York*, 486 U.S. at 63-64, 108 S.Ct. 1637; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 698-700, 104 S.Ct. 2694. The statute therefore does not violate the Tenth Amendment either facially or as applied. We have considered petitioners' remaining constitutional arguments and find them to be without merit.

Conclusion

The FCC orders are affirmed with costs to be borne by petitioners.

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

CELLULAR PHONE TASKFORCE, *et al.*,

Petitioners,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION, NATIONAL ASSOCIATION OF BROADCASTERS, ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC., ELECTROMAGNETIC ENERGY ASSOCIATION, and AT&T WIRELESS SERVICES, INC.,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

Docket Nos. 97-4328(L), 98-4003(Con), 98-4005(Con), 98-4025(Con), 98-4122(Con).

Argued April 5, 1999

Decided Feb. 18, 2000
Petition for Rehearing Filed April 3, 2000
Decided June 6, 2000

Associations challenged two final opinions and orders in which Federal Communications Commission (FCC) promulgated guidelines for health and safety standards of radio frequency (RF) radiation, established streamlined procedures for meeting requirements under National Environmental Policy Act (NEPA) for FCC licensees that complied with guidelines, and retained exclusive ability to regulate relevant radio

facility operations. The Court of Appeals, 205 F.3d 82, affirmed. On petition for rehearing, the Court of Appeals held that: (1) FCC was not liable under Title II of Americans with Disabilities Act (ADA), and (2) complaint did not state Rehabilitation Act claim.

Petition denied.

Edward J. Collins, Cambridge, Massachusetts, *petitioner*.

Before: NEWMAN, WALKER, and SACK, *Circuit Judges*.

ON PETITION FOR REHEARING

PER CURIAM:

Petitioner Cellular Phone Taskforce ("CPT") has petitioned for rehearing to reconsider our decision in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000). We assume familiarity with our earlier decision.

CPT requests, *inter alia*, that we reconsider our determination that CPT's claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.* were not properly before us. In response to our decision that an FCC staff member's ruling on these claims was not an appealable final order of the FCC, CPT argues that the FCC did not issue a final order only because it impermissibly delegated its final decision to an agency staff member. We express no view as to the FCC's delegation of decisionmaking but, on reconsideration, agree that on the facts of this case CPT had done all it reasonably could to secure a final agency determination. Considering the discretion we have to review non-final agency determinations, *see National Black Media Coalition v. FCC*, 791 F.2d 1016, 1021 (2d Cir. 1986), we have chosen to consider the merits of CPT's claims.

(1) CPT filed suit under Title II of the ADA, alleging that the FCC had forced states and local governments to discriminate against electrically sensitive people in violation of the ADA. *See* 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in . . . the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"). CPT's claim fails, however, because Title II of the ADA is not applicable to the federal government. *See* 42 U.S.C. § 12131(1) ("The term 'public entity' means . . . any State or local government" or "any department, agency, special purpose district, or other instrumentality" thereof). Regardless of how the actions of state and local governments may or may not be affected by the FCC's challenged guidelines, the FCC itself cannot be made liable under Title II of the ADA.

(2) CPT's claim under the Rehabilitation Act is also unavailing. CPT argues that the FCC's guidelines violate the Rehabilitation Act by permitting the proliferation of FCC-regulated radio frequency ("RF") transmitters. This misconstrues the scope of the Rehabilitation Act's protections. In this context, the Rehabilitation Act applies only to the discriminatory denial of the benefits of a "program or activity" of the FCC. 29 U.S.C. § 794(a). CPT claims that electrically sensitive people are generally being excluded from aspects of modern life by the proliferation of RF transmitters. But CPT does not allege that electrically sensitive people are being denied the benefit of, or are subject to discrimination under, any "program or activity" of the FCC. Thus, CPT's Rehabilitation Act claim against the FCC is without merit.

We have considered CPT's remaining arguments for rehearing and find them to be without merit. The petition for rehearing is therefore denied.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

40 Foley Square
New York, New York 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of June, Two Thousand

Present:

Hon. Jon O. Newman,
Hon. John M. Walker, Jr.,
Hon. Robert D. Sack,

Circuit Judges.

UNITED STATES
COURT OF APPEALS
FILED
JUNE 15 2000
Roseann B. MacKechnie,
Clerk
SECOND CIRCUIT

CELLULAR PHONE TASKFORCE, *et al.*,

Petitioners,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION, *et al.*,

Intervenors,

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Docket Nos.:

97-4328(L),
98-4003(Con),
98-4005(Con),
98-4025(Con),
98-4122(Con)

A petition for panel rehearing having been filed herein by Petitioners Communication Workers of America, AFL-CIO, CWA Local 7810 & the Washington State Council of CWA Locals.

Upon consideration thereof, it is Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/ Beth J. Meador

Beth J. Meador,
Administrative Attorney

CONSTITUTIONAL PROVISIONS:

Article 1, Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article 1, Section 8, Paragraph 18

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Amendment One

Congress shall make no law . . . abridging the freedom of speech . . .

Amendment Five

. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . .

Amendment Ten

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Telecommunications Act of 1996, P.L. 104–104, 110 Stat. 151, Sec. 704(a) and (b), as follows:

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY. — Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

"(7) PRESERVATION OF LOCAL ZONING AUTHORITY. —

"(A) GENERAL AUTHORITY. — Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

"(B) LIMITATIONS. —

"(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof —

"(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

"(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

"(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or

instrumentality, taking into account the nature and scope of such request.

"(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

"(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

"(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

"(C) DEFINITIONS.—For purposes of this paragraph—

"(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

"(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

"(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).".

(b) RADIO FREQUENCY EMISSIONS. — Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

National Environmental Policy Act, 42 U.S.C. 4332, in relevant part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Rehabilitation Act, 29 U.S.C. 794(a) and (b), as follows:

§ 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

(a) Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees. No otherwise qualified individual with handicaps in the United States, as defined in section 7(8) [29 USCS § 706(8)], shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of —

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 1471(12) of the Elementary and Secondary Education Act of 1965 [20 USCS § 2891(12)]), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship —

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

47 CFR 1.1801 *et seq.*, "Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Federal Communications Commission." In relevant part:

1.1830(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Commission.

(b)(1) The Commission, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap —

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

* * *

(3) The Commission may not directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would —

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

* * *

(6) The Commission may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the Commission establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to

discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the Commission are not, themselves, covered by this part.

1.1870 *Compliance procedures.*

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Commission.

(b) The Commission shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791.

(c) The Managing Director shall be responsible for coordinating implementation of this section. Complaints may be sent to the Handicapped Coordinator, Office of Managing Director, Federal Communications Commission, 1919 M Street NW., Room 852, Washington, DC 20554.

(d) *Acceptance of complaint.* (1) The Commission shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within one-hundred eighty (180) days of the alleged act of discrimination. The Commission may extend this time period for good cause.

(e) If the Commission receives a complaint that is not complete, the complainant will be notified within thirty (30) days of receipt of the incomplete complaint that additional information is needed. If the complainant fails to complete the complaint within thirty (30) days of receipt of this notice, the Commission shall dismiss the complaint without prejudice.

(f) If the Commission receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity."

* * *

(g) Within one-hundred eighty (180) days of the receipt of a complete complaint for which it has jurisdiction, the Commission shall notify the complainant of the results of the investigation in a letter containing —

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within ninety (90) days of receipt from the Commission of the letter required by §1.1870(g). The Commission may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Office of the Secretary, Federal Communications Commission, 1919 M Street NW., Room 202, Washington, DC 20554.

(j) The Commission shall notify the complainant of the results of the appeal within sixty (60) days of the receipt of the request. If the Commission determines that it needs additional information from the complainant, it shall have sixty (60) days from the date it receives the additional information to make its determination on the appeal.

2 FCC rcd Vol. 8: 2199-2213, FCC 87-108, Gen. Docket No. 84-533, In the Matter of Amendment of Part I of the Commission's Rules to Implement Section 504 of the Rehabilitation Act of 1973, as Amended, 29 U.S.C. §794. *Report and Order*, adopted March 27, 1987. In relevant parts:

Section 1.1830 *General prohibition against discrimination*

* * *

Paragraph (b)(6) prohibits the Commission from discriminating against qualified individuals with handicaps on the basis of handicap in the granting of licenses or certification . . .

In addition, the Commission may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. For example, the Commission must comply with these non-discrimination requirements when establishing safety standards for the operations of licensees. Thus, the Commission must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with handicaps in an impermissible manner.

Paragraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity, and thereby indirectly affect limited aspects of their operations. [pp. 2203-2204]

* * *

Section 1.1870 *Compliance procedures*

* * *

One appeal within the Commission shall be provided (section 1.1870(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance (section 1.1870(i)). [p. 2208]

Arthur Firstenberg
Cellular Phone Taskforce
Post Office Box 100404
Vanderveer Station
Brooklyn, New York 11210
(718) 434-4499

DOCKET FILE COPY ORIGINAL

February 2, 1997

Handicapped Coordinator
Office of Managing Director
Federal Communications Commission
1919 M Street NW, Room 852
Washington, DC 20554

FCC MAIL ROOM
FEB 6 1997
RECEIVED

COMPLAINT

To the Handicapped Coordinator:

Please accept this complaint of discrimination by the Federal Communications Commission on the basis of handicap.

On August 6, 1996 the Federal Communications Commission (FCC) adopted into effect its Report and Order in the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62. This action by the FCC discriminates against electrosensitive individuals, numbering at least 2% of the population of the United States. These individuals must, by medical necessity, avoid all exposure to artificial electromagnetic fields, and are harmed by microwaves at levels many orders of magnitude lower than those permitted by the Safety Guidelines adopted by the FCC on August 6, 1996. This will have the effect of depriving this large disabled population, which is represented as a class by the Cellular Phone Taskforce, of their health and in some cases of their lives, because the expected proliferation of microwave emitting sources throughout the country in the wake of the

new Safety Guidelines will not leave the electrosensitive any areas of the United States where they will be able to avoid exposure to microwaves. The public streets, all public places, and their own homes will become inaccessible to them.

The electrosensitive are qualified individuals with handicaps as defined in 47 CFR Ch. 1, Sec. 1.1803. We are individuals with handicaps. Instead of benefiting from the improved communication networks allowed by this FCC action, this group of Americans will be, and already is, severely harmed.

47 CFR Ch. 1, Sec 1.1830(a) states that "no qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Commission."

47 CFR Ch. 1, Sec. 1.1830(b)(3) further states that "the Commission may not . . . utilize criteria or methods of administration the purpose or effect of which would subject qualified individuals with handicaps to discrimination on the basis of handicap.

The electrosensitive are discriminated against by the Commission's August 6 Report and Order, and its Final Rule, under the clauses cited above.

Enclosed are the following:

1. Petition for Reconsideration filed August 30, 1996 by the Cellular Phone Taskforce.

2. Reply to Comments of AT&T Wireless Services, Inc., filed October 15, 1996 by the Cellular Phone Taskforce. Page 9 of this reply is a relevant letter by Lucinda Grant of the Electrical Sensitivity Network.

3. Notice of Decision — Fully Favorable, dated April 17, 1996, establishing this writer as a qualified individual with handicap as recognized by the Social Security Administration. My electrosensitivity was acknowledged in the decision.

4. Letter from Dr. Kenneth Jaffe concerning this writer's electrosensitivity, dated Nov. 15, 1994.

5. Pages 33–37 of *Microwaving Our Planet: The Environmental Impact of the Wireless Revolution*, Arthur Firstenberg, New York: Cellular Phone Taskforce, 1996, on electrosensitivity, including extensive scientific and medical documentation. This book reviews the known and proven hazards of microwave radiation at levels as low as 2.6×10^{-12} milliwatts per square centimeter, twelve orders of magnitude lower than what the FCC permitted on August 6, 1996.

The members of the electrosensitive class represented by the Cellular Phone Taskforce live throughout the United States. We are aware of hundreds in New York City alone who have been made ill or even forced to leave their homes and their city by the radiation from new transmitting antennas which are in compliance with the August 6, 1996 Safety Guidelines of the FCC.

Any further information will be gladly furnished upon request from the undersigned.

Sincerely,

/s/ Arthur Firstenberg

Arthur Firstenberg
Chairman, Cellular Phone Taskforce

Federal Communications Commission
Washington, D.C. 20554

[SEAL]

JUL 14 1997

Arthur Firstenberg
Cellular Phone Taskforce
P.O. Box 100404
Vanderveer Station
Brooklyn, NY 11210

Dear Mr. Firstenberg:

Your letter of February 2, 1997, addressed to the "Handicapped Coordinator" of the Federal Communications Commission (FCC) was forwarded to this office from the FCC's Disabilities Issues Task Force (DITF). Your letter included a complaint of discrimination on the basis of a disability. Specifically, your letter claims that the FCC's action in ET Docket 93-62, adopting new guidelines for human exposure to radiofrequency electromagnetic fields, discriminates against individuals who are "electrosensitive."

Your letter included several attachments, including a copy of the petition for reconsideration, dated August 30, 1996, that was filed by you and your organization in the above-referenced docket. The purpose of this letter is to advise you that your petition was accepted by the FCC, and it, along with several other petitions for reconsideration, is still under consideration by the Commission. The issue of electrosensitivity discussed in your letter was also one of the issues raised in your petition. The Commission will address all of the issues in the various petitions, including yours, in a forthcoming decision. Therefore, we cannot consider your complaint separately but, rather, refer you to the final FCC decision, expected within the next several weeks. This decision will be posted on the FCC's World Wide Web Site: www.fcc.gov, and will also be available at the DITF Web Site: www.fcc.dtf.

If you have further questions, please contact our radio-frequency safety program at (202) 418-2464.

Sincerely,

/s/ Richard M. Smith

Richard M. Smith
Chief
Office of Engineering and Technology

cc. M. Cove, DITF

Before the
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

Complaint of Discrimination
on the Basis of Handicap
Filed by the Cellular Phone
Taskforce on February 2, 1997

APPEAL

The Cellular Phone Taskforce ("Taskforce") hereby appeals the denial of the above-referenced Complaint, as contained in the letter of July 14, 1997 from the Commission to the Taskforce. This appeal is based on the failure of the Commission to address the several issues raised in said Complaint, and also on the failure of the Commission to follow its own required procedures as set forth in 47 CFR 1.1870.

1. *The Complaint was accepted by the Commission.*

The Taskforce received correspondence from the Disabilities Issues Task Force ("DITF") in March 1997 requesting to defer consideration of the Complaint pending the expected release of the Second Memorandum Opinion and Order in ET Docket 93-62, which, according to the DITF, would address the issues raised by the Taskforce in its Complaint. The Taskforce further received a letter on July 14, 1997 from the Office of Engineering and Technology, again deferring consideration of the Complaint pending the expected release of the Second Memorandum.

The Commission's rules state, in 47 CFR 1.1870(d)(1), that "The Commission shall accept and investigate all complete complaints for which it has jurisdiction." The rules state further in Section 1.1870(d)(2) that "the complainant will be notified within thirty (30) days" if the complaint is not

complete, and in Section 1.1870(e) that the Commission "shall promptly notify the complainant" if the Commission does not have jurisdiction over the complaint.

The two letters received by the Taskforce from separate offices of the Commission, and the absence of timely notification of either incompletion or lack of jurisdiction, constitute acceptance of the Taskforce's Complaint of February 2, 1997 under the Commission's rules.

2. *The Commission failed to follow its own procedures.*

The Commission's rules state, in 47 CFR 1.1870(g):

> "Within one-hundred eighty (180) days of the receipt of a complete complaint for which it has jurisdiction, the Commission shall notify the complainant of the results of the investigation in a letter containing--
>
> "(l) Findings of fact and conclusions of law;
> "(2) A description of a remedy for each violation found;
> and
> "(3) A notice of the right to appeal."

The one-hundred eighty days from the date of the Taskforce's Complaint expired on August 1, 1997. The only response to the Complaint by the Commission before this date is the letter of July 14, 1997 from the Office of Engineering and Technology, signed by Richard M. Smith. This letter not only failed to state findings of fact and conclusions of law, as required, but specifically deferred doing so, in violation of Commission rules.

Furthermore, the letter of July 14, 1997 did not contain a notice of the right of the Taskforce to appeal, also as required by the Commission's rules.

3. *The issue of discrimination was incorrectly deferred to a decision in ET Docket 93-62.*

The Complaint of February 2 specifically alleges that the Final Rule in ET Docket 93-62 is an act of discrimination by the Commission against a group of qualified disabled individuals, under 47 CFR 1.1830(a) and (b). The issue of discrimination *by the Commission* is not an issue that was raised in ET Docket 93-62. Therefore the Second Memorandum Opinion and Order in that Docket could not have been expected to, and in fact did not, address this issue, and the matter therefore remains unresolved.

4. *The issue of electrosensitivity also remains unaddressed.*

The Commission disposed of the issue of electrosensitivity in the Second Memorandum Opinion and Order by merely noting in paragraph 31 that it is not qualified to evaluate the issue, and implying that such evaluation should be done by "expert organizations and federal agencies with responsibilities for health and safety."

If it is the case, as implied in paragraph 31 of the Second Memorandum, that the Commission does not have jurisdiction over complaints involving electrosensitivity, then the Commission is required under its rules, in 47 CFR 1.1870(e), to refer the complaint to the appropriate government agency, and the Commission should not have accepted this Complaint.

If, however, the Commission does have jurisdiction, then it is incumbent on the Commission to investigate complaints based on electrosensitivity and to produce findings of fact and conclusions of law as required in Section 1.1870(g).

5. *Conclusion.*

The letter of July 14, 1997 constitutes the extent of the Commission's response to the Taskforce's complaint of February 2, 1997, and as such is a denial of said complaint. The specifics of the complaint, namely discrimination on the basis of electrosensitivity, were not investigated, and findings of fact and conclusions of law were not made. The Taskforce therefore appeals this denial under the procedures set forth in 47 CFR 1.1870(h). The electrosensitive of the United States, being a class of qualified individuals with handicaps, continue to be deprived of our health, our welfare, our livelihood, our homes, our enjoyment of life, the use of the national communication and transportation networks, and our future, by virtue of the Radiofrequency Safety Guidelines adopted by the Commission on August 6, 1997. Those Safety Guidelines must be set aside.

Respectfully submitted,

October 6, 1997 by /s/ Arthur Firstenberg

Arthur Firstenberg
President, Cellular Phone Taskforce
Post Office Box 100404
Vanderveer Station
Brooklyn, New York 11210
(718) 434-4499

Federal Communications Commission
Washington, D.C. 20554

[SEAL]

FEB 2 1998

Arthur Firstenberg
President, Cellular Phone Taskforce
Post Office Box 100404
Vanderveer Station
Brooklyn, New York 11210

Dear Mr. Firstenberg:

This is in response to the pleading ("Appeal") filed by the Cellular Phone Taskforce ("Taskforce") with the Federal Communications Commission (FCC) on October 8, 1997. The Taskforce claims that the Commission failed to address several issues raised in the Taskforce's original pleading ("Complaint") filed with the FCC on February 3, 1997, alleging discrimination by the FCC on the basis of handicap ("electrosensitivity").

The Taskforce makes the following claims: (1) that the Taskforce's pleading was accepted by the Commission as a formal complaint under 47 CFR 1.1801 *et seq.*, implying FCC jurisdiction, but that the FCC improperly deferred considering it, pending the expected release of the FCC's *Second Memorandum Opinion and Order* in ET Docket 93-62, as stated in a letter, dated July 14, 1997, from Richard M. Smith, Chief, FCC Office of Engineering and Technology; (2) that the Commission failed to follow its own procedures as outlined in 47 CFR 1.1870(g); (3) that the issue of discrimination was incorrectly deferred to a decision in ET Docket 93-62; and (4) that the issue of electrosensitivity remains unaddressed by the FCC. In its conclusion, the Taskforce urges that the radiofrequency safety guidelines adopted by the FCC in 1996, and reaffirmed in 1997, be set aside.

With regard to point (1), the letter of July 14, 1997, from Mr. Smith stated that the Taskforce's pleading would be considered along with the several petitions for reconsideration filed in ET Docket 93-62, including the one filed previously by the Taskforce, and that, therefore, the FCC could not consider your pleading separately pending the forthcoming decision in that docket. In other words your pleading was not considered by the Commission to be a formal complaint filed under the FCC's Rules in 47 CFR 1.1801 *et seq.*

With respect to the Taskforce's claim that radiofrequency emissions from our licensees are discriminating against certain "electrosensitive" individuals, 47 CFR 1.1802 and 1.1830(b)(6) state that "the programs and activities of entities that are licensed or certified by the FCC are not covered by these regulations." This is consistent with legal precedent that has held that Section 794 of the Rehabilitation Act of 1973 does not allocate enforcement responsibilities to Federal agencies with respect to their licensees, and that the phrase "activity or program" refers to programs or activities administered or funded by Federal agencies and not those of entities licensed or certified by the FCC. (*See Community Television of Southern California v. Gottfried*, 103 S Ct 885 (1983); *California Association of the Physically Handicapped v. FCC*, 840 F. 2d 88 (1988). Since the FCC's RF guidelines do not have an "effect" until actually implemented and utilized by our licensees, a complaint about the guidelines is, in effect, a complaint about activities of regulated entities and, thus, outside the scope of our regulations implementing the Rehabilitation Act. This reasoning further supports the Commission's decision not to formally "accept" the original pleading as a complaint of discrimination under the rules implementing the Rehabilitation Act.

Concerning point (2), the Commission dealt with your pleading and earlier petition along with other petitions, as the July 14 letter stated it would, in the *Second Memorandum Opinion*

and Order, FCC 97-303, issued by the Commission on August 25, 1997. As discussed above, since your "complaint" does not present a cognizable claim under the Rehabilitation Act or our implementing regulations, the objections you outlined claiming the FCC did not follow the procedures of 47 CFR 1.1870(g) are invalid.

Point (3) claims that the issue of discrimination was incorrectly deferred to ET Docket 93-62 and was not properly addressed there. As noted above, the Taskforce's February pleading was appropriately considered, along with other pleadings, in ET Docket 93-62. Therefore, the issues raised in the Taskforce's pleading, namely that electrosensitive persons are harmed by the FCC's new guidelines, was addressed in that docket (see paragraphs 31 and 111 of the *Second Memorandum Opinion and Order*).

Similarly, point (4) claims the Commission has failed to address the issue of "electrosensitivity." As stated above, this issue was clearly discussed in the *Second Memorandum Opinion and Order.* For example, in paragraph 111 of the Order the Commission states:

> "The Commission does not have the expertise to make independent judgements on such alleged health effects as "electrosensitivity" or other reported effects on human health. This is the responsibility of the federal health and safety agencies and other qualified public health organizations. Therefore, we continue to consider our new guidelines appropriately protective of public health. There is no evidence to suggest that transmitters or facilities that comply with our guidelines will cause adverse health effects. Our guidelines adopted the most conservative aspects of the ANSI/IEEE and NCRP recommended exposure criteria and have been recommended by all of the relevant health and safety agencies."

Therefore, for the aforementioned reasons, the "Appeal," filed by the Taskforce on October 8, 1997, is not accepted by the Commission as valid under its rules in 47 CFR 1.1801 *et seq.*, and it will not be considered under the procedures set forth in those sections of the FCC's Rules and Regulations.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Richard M. Smith

Richard M. Smith
Chief
Office of Engineering and Technology